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**KRISTEN INVESTMENT PROPERTIES, LLC, Appellant v. FAULKNER
COUNTY WATERWORKS and SEWER PUBLIC FACILITIES BOARD d/b/a
Faulkner County Public Facilities Board, et al., Appellees.**

CA 99-1250

COURT OF APPEALS OF ARKANSAS, DIVISIONS THREE AND FOUR

72 Ark. App. 37; 32 S.W.3d 60; 2000 Ark. App. LEXIS 782

December 6, 2000, Decided

PRIOR HISTORY: [***1] AN APPEAL FROM
FAULKNER COUNTY CIRCUIT COURT. CIV99-186.
HON. DAVID L. REYNOLDS, JUDGE.

findings of fact under the abuse-of-discretion standard.
Instead, the court reviews findings of fact under the
clearly erroneous standard. Ark. R. Civ. P. 52(a).

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

*Administrative Law > Governmental Information >
Freedom of Information > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees >
General Overview*
[HN1] See Ark. Code Ann. § 25-19-107(d) (Supp. 1999).

*Administrative Law > Governmental Information >
Freedom of Information > General Overview*
[HN2] The Arkansas Supreme Court has broadly
construed the Freedom of Information Act, Ark. Code
Ann. § 25-19-101 et seq., in favor of disclosure.

*Administrative Law > Governmental Information >
Freedom of Information > Remedies > Costs &
Attorney Fees > General Overview
Civil Procedure > Appeals > Standards of Review >
Clearly Erroneous Review*
[HN3] An appellate court does not review a trial court's

*Administrative Law > Governmental Information >
Freedom of Information > Remedies > Costs &
Attorney Fees > General Overview*
[HN4] The Arkansas Supreme Court has consistently
held the Freedom of Information Act, Ark. Code Ann. §
25-19-101 et seq., applicable to private entities that
receive public funds.

*Administrative Law > Governmental Information >
Freedom of Information > General Overview*
[HN5] The intent of the Freedom of Information Act,
Ark. Code Ann. § 25-19-101 et seq., is to establish the
right of the public to be fully apprised of the conduct of
public business.

*Administrative Law > Governmental Information >
Freedom of Information > Remedies > Costs &
Attorney Fees > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees >
Attorney Expenses & Fees > Statutory Awards*
[HN6] A finding of an arbitrary refusal or bad faith on
the part of public officials in releasing records under Ark.
Code Ann. § 25-19-107(d) of the Freedom of Information
Act, Ark. Code Ann. § 25-19-101 et seq., is not necessary

in order for the trial court to award attorney's fees. Further, limiting the award of attorney's fees to only those cases involving a showing of bad faith or arbitrary conduct would be contrary to the liberal interpretation that appellate courts are to accord the Arkansas Freedom of Information Act and would defeat the intent of the general assembly in enacting it.

HEADNOTES

1. RECORDS -- FREEDOM OF INFORMATION ACT -- CONSTRUED IN FAVOR OF DISCLOSURE. -- Since its enactment, the Freedom of Information Act (FOIA) has been broadly construed in favor of disclosure.

2. APPEAL & ERROR -- TRIAL COURT'S FINDINGS OF FACT -- CLEARLY ERRONEOUS STANDARD. -- The appellate court does not review a trial court's findings of fact under the abuse-of-discretion standard; instead, it reviews findings of fact under the clearly erroneous standard.

3. RECORDS -- FREEDOM OF INFORMATION ACT -- APPLICABLE TO PRIVATE ENTITIES THAT RECEIVE PUBLIC FUNDS. -- The supreme court has consistently held the Freedom of Information Act applicable to private entities that receive public funds.

4. RECORDS -- FREEDOM OF INFORMATION ACT -- INTENT. -- The intent of the Freedom of Information Act is to establish the right of the public to be fully apprised of the conduct of public business.

5. RECORDS -- FREEDOM OF INFORMATION ACT -- ATTORNEY'S FEES AUTHORIZED WHERE APPELLEE'S DENIAL OF APPELLANT'S REQUEST CONSTITUTED ARBITRARY CONDUCT. -- Appellee volunteer fire department's denial of appellant's Freedom of Information Act request in the face of its knowledge that it was essentially performing a governmental function for which it received public funding and in the face of various legal authorities constituted arbitrary conduct for which attorney's fees were authorized.

6. RECORDS -- FREEDOM OF INFORMATION ACT -- FEE AWARD NEED NOT BE MADE IN EVERY CASE. -- A trial court need not make a fee award in every Freedom of Information Act case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records; a finding of an

arbitrary refusal or bad faith is not necessary in order for the trial court to award attorney's fees; limiting the award of attorney's fees to only those cases involving a showing of bad faith or arbitrary conduct would be contrary to the liberal interpretation that we are to accord the FOIA and would defeat the intent of the General Assembly in enacting it.

7. RECORDS -- TRIAL COURT'S FINDING OF SUBSTANTIAL JUSTIFICATION FOR REFUSING DISCLOSURE WAS CLEARLY ERRONEOUS -- TRIAL COURT ABUSED DISCRETION IN DENYING ATTORNEY'S FEES. -- The appellate court held that the trial court's finding that appellee volunteer fire department had substantial justification for refusing disclosure of the requested records was clearly erroneous; the appellate court further held that the trial court abused its discretion in denying appellant's petition for attorney's fees because it had no discretion to deny attorney's fees where the party refusing the request lacked substantial justification for doing so and absent evidence of other circumstances that would make the award of such fees unjust; the appellate court reversed and remanded with directions that the trial court conduct further proceedings to determine the legal expenses and costs incurred by appellant in obtaining the requested records, including costs incurred on appeal, and ordered the trial court to award appellant appropriate attorney's fees.

COUNSEL: Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: John K. Baker and Marshall S. Ney, for appellant.

Gill Elrod Ragon Owen Skinner & Sherman, P.A., by: Heartsill Ragon, III, and Roger H. Fitzgibbon, Jr., for appellee **Beaverfork** Volunteer Fire Department, Inc.

JUDGES: WENDELL L. GRIFFEN, Judge. ROBBINS, C.J., BIRD, and NEAL, JJ., agree. STROUD and KOONCE, JJ., dissent.

OPINION BY: WENDELL L. GRIFFEN

OPINION

[*38] [**60] WENDELL L. GRIFFEN, Judge. Kristen Investment Properties, LLC ("Kristen" or "appellant"), appeals from the Faulkner County Circuit Court's denial of its request for attorney's fees under the Freedom of Information Act (FOIA). The court granted judgment in favor of appellant and ordered appellee

Beaverfork Volunteer Fire Department, Inc. (**Beaverfork**), a private nonprofit corporation, to produce certain records ¹ pursuant to [*39] appellant's FOIA request. However, the trial court found that **Beaverfork** was substantially [**61] justified in denying appellant's FOIA request and that an award of attorney's fees would be unjust. Therefore, the trial court denied appellant's petition for attorney's fees. We hold that the trial court's findings are clearly erroneous and that the trial court abused its discretion in not awarding attorney's [***2] fees. Hence, we reverse and remand for the determination and award of attorney's fees.

1 The court ordered **Beaverfork** to produce all by-laws of the nonprofit corporation, minutes from all corporate board meetings, minutes from all division and committee meetings including the Executive Committee and Water Supply Division, copies of all written contracts to supply water to residential, commercial, and development customers, copies of all monthly, quarterly, and annual financial reports, and copies of all lists or compilations evidencing water customers of **Beaverfork** Fire Department, Inc., and/or its Water Supply Division.

Kristen is the developer of Cadron Creek Estates, a residential subdivision within the service area of the **Beaverfork** Volunteer Fire Department and its water-supply division. **Beaverfork** is a private nonprofit corporation that operates a water-distribution system and provides fire protection service pursuant to a contractual arrangement with the **Beaverfork** Fire Protection District in northern [***3] Faulkner County. In December 1998, Kristen attempted to apply to **Beaverfork** for water-service connection to Cadron Creek Estates but was informed that applications were not being granted. Kristen's attorney delivered a letter dated April 15, 1999, to Marvin DeBoer, president of **Beaverfork**, requesting the records previously cited. In a letter dated April 21, 1999, counsel for **Beaverfork** informed counsel for Kristen that the requested records would not be disclosed based on **Beaverfork's** position that it was not covered by the FOIA because it is a nonprofit private corporation "not supported in whole or in part by public funds." **Beaverfork's** counsel cited *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993), in the letter and asserted that **Beaverfork's** only connection to public funding came indirectly through governmental loans (rather than grants)

and that such loans did not bring **Beaverfork** within the FOIA's purview.

Kristen then filed a complaint to compel **Beaverfork** to produce documents under the FOIA and filed a petition for writ of mandamus seeking to compel **Beaverfork** to extend water mains and to supply water to Cadron [***4] Creek Estates. Following a hearing on June 29, 1999, the trial court entered judgment in favor of Kristen and ordered **Beaverfork** to produce or permit inspection of the documents requested in Kristen's April 15, 1999 letter. However, the trial court found that **Beaverfork** was substantially justified in denying the FOIA request and that an award of attorney's fees would be unjust.

[*40] The FOIA attorney's fee provision is found at *Arkansas Code Annotated Section 25-19-107(d)* (Supp. 1999) and states:

[HN1] In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust

Arkansas enacted the FOIA in 1967. Since that time, [HN2] our supreme court has broadly construed the FOIA in favor of disclosure. *See McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989); *see also Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998). [***5] With that standard in mind, our initial duty is to determine whether the trial court's findings that **Beaverfork** was "substantially justified" in denying **Beaverfork's** FOIA request or that other circumstances made an award of attorney's fees "unjust" are clearly erroneous. [HN3] We do not review a trial court's findings of fact under the abuse-of-discretion standard. Instead, we review findings of fact under the clearly erroneous standard. *See Ark. R. Civ. P. 52(a)*. *See also Sebastian County Chapter of American Red Cross v. Weatherford*, *supra*. We hold that the trial court's findings are clearly erroneous.

While the trial court's order identifies neither what it deemed to be **Beaverfork's** "substantial justification" for denying appellant's [**62] request nor what "other circumstances make an award of attorneys fees unjust," it is clear that **Beaverfork's** assertion that it was not

publicly funded was neither well-founded nor substantial. [HN4] Our supreme court has consistently held the FOIA applicable to private entities that receive public funds. See, e.g., *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Rehab. Hosp. Servs. Corp. v. Delta-Hills Health Sys., Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985); [***6] *North Central Ass'n of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977).

In *Edmark*, *supra*, the supreme court held that records retained by private attorneys employed by the city of Fayetteville were subject to FOIA disclosure because the private attorneys had been hired in lieu of the city attorney and were paid with public funds. In *NorthCentral*, *supra*, our supreme court held that a reporter was improperly excluded from a state meeting of the association, a [*41] private nonprofit corporation that sets educational standards and policies for colleges and secondary schools. The controlling factor underlying the *North Central* court's decision was that more than 90% of the money contributed to the association by Arkansas schools was public money. In *Delta-Hills*, *supra*, the supreme court held that a private nonprofit corporation created under federal law to assist the Arkansas State Health Planning and Development Agency in the regional review of proposed health care changes was subject to the FOIA because the primary source of funding for the private entity came from the federal government.

[***7] Notwithstanding these decisions, **Beaverfork** contends it was justified in believing that it was not subject to the FOIA because its only connection to public funding is indirect support via state and federal loans. As it did in its letter to appellant denying access to its records, **Beaverfork** on appeal relies upon *Weatherford*, *supra*. In that case, the trial court found that the Sebastian County Chapter of the American Red Cross was publicly funded for FOIA purposes by virtue of its one dollar per year, thirty-year lease with the city of Fort Smith. The supreme court reversed, holding that indirect government benefits or subsidies do not constitute "public funds" under the plain and ordinary meaning evidenced by *Black's Law Dictionary* (6th Ed. 1990), which defines public funds as "moneys belonging to government". The *Weatherford* court concluded, "here, no payment of government moneys was made to the Red Cross and the concomitant application of the FOIA should not transpire." *Id.* at 660, 846 S.W.2d at 645.

Relying on the reasoning employed in *Weatherford*, **Beaverfork** contends that the \$ 2.9 million in federal and state loans it received constituted only indirect [***8] government benefits and therefore, it was not publicly funded for FOIA purposes. However, the trial court here apparently concluded that **Beaverfork** comes within the purview of the FOIA for a different reason -- it also performs public safety and utility functions traditionally performed by governmental entities by providing fire protection and water service pursuant to its contractual arrangement with the **Beaverfork** Fire Protection District, and receives funding from a public source. **Beaverfork** did not cross-appeal the trial court's judgment in that regard.

Marvin DeBoer, president of the board of the **Beaverfork** Volunteer Fire Department, Inc., testified that **Beaverfork** is a private [*42] nonprofit volunteer fire department comprised of two divisions: the Fire Protection Division and the Water Division. The **Beaverfork** Fire Protection District ("District") is a creature of state law established by the Faulkner County Quorum Court. **Beaverfork** has an exclusive contract with the Fire Protection District to provide fire protection and water service to persons within the District. **Beaverfork's** Water Division is funded by user fees assessed against property within the District and collected by [***9] the Faulkner [**63] County Assessor's Office. Those assessments are paid to appellee's Fire Protection Division and Water Division, although the revenues and accounting systems for the Fire Protection Division and the Water Division are separate.

DeBoer testified:

"I don't know if it's the County Assessor that does it, but whoever collects money in the County collects the money from everybody within **Beaverfork** Fire Protection District's geographic area. It's not a private enrollment or membership to pay in the Fire Protection District because the voters voted for that district. In determining what noun to put on it in terms of tax or assessment, I believe it's a service fee."

Thus, **Beaverfork** knew that the fees received by its Water Division are payments from the **Beaverfork** Fire Protection District, a plainly public entity, based on assessments made on all property within the district.

The facts in this case are directly on point with the facts in *Edmark*, *supra*. In *Edmark*, public funds were

paid by a municipality to private lawyers as compensation for work that would otherwise have been performed by the city attorney. Here, funds obtained by a public assessment against [***10] all land within the **Beaverfork** Fire Protection District, a public entity, are paid to **Beaverfork**, a private entity holding an exclusive franchise from the Fire Protection District to provide water service to customers in the District, a service routinely provided by government. DeBoer acknowledged that the payment made by the Fire Protection District "comes from some money collected by the County Assessor." Further, our supreme court's decisions in *North Central*, *supra*, and *Edmark*, *supra*, are also directly on point because the funding for operating the Water Division comes from a public source in the form of a levy against property owned within the District. Moreover, we note that the [*43] Arkansas Attorney General has opined that private water associations that are supported in part by public funds and that perform functions normally served by governmental entities are subject to the FOIA. *See* Op. Att'y Gen. # 92-205.

Our courts have consistently held that [HN5] the intent of the FOIA is to establish the right of the public to be fully apprised of the conduct of public business. *See Edmark* 304 Ark. at 184-85, 801 S.W.2d at 278. Even counsel for **Beaverfork** [***11] acknowledged during closing argument to the trial court that his client is "in a sense, no different from Niblock Law Firm the private law firm in *Edmark* in that we've been hired to do a job for a government entity." **Beaverfork's** denial of appellant's FOIA request in the face of such knowledge regarding the source of its funding and in the face of the foregoing legal authorities constituted arbitrary conduct for which attorney's fees are authorized under the supreme court's decision in *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998).

In *Burke v. Strange*, the supreme court stated that a "trial court need not make a fee award in every Freedom of Information Act case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records." *Id.* at 331, 983 S.W.2d at 391. *See also Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989). We note that [HN6] a finding of an arbitrary refusal or bad faith is not necessary in order for the trial court to award attorney's fees. *See id.* Further, limiting the award of attorney's fees to [***12] only those cases

involving a showing of bad faith or arbitrary conduct would be contrary to the liberal interpretation that we are to accord the FOIA and would defeat the intent of the General Assembly in enacting it. *See Ark. Code Ann. § 25-19-102; Ragland v. Yeagan*, 288 Ark. 81, 702 S.W.2d 23 (1986). *See also Burke v. Strange*, *supra* (GLAZE, J., dissenting). However, in this case, given that **Beaverfork** knew it was essentially performing a [**64] governmental function for which it received public funding, we have no difficulty concluding that its refusal to produce the records pursuant to appellant's FOIA request was arbitrary to say the least, if not in bad faith.

Given the above authorities, we hold that the trial court's finding that **Beaverfork** had substantial justification for refusing disclosure of the requested records was clearly erroneous. We further hold that the trial court abused its discretion in denying appellant's [*44] petition for attorney's fees because it had no discretion to deny attorney's fees where the party refusing the request lacked substantial justification for doing so and absent evidence of other circumstances [***13] that would make the award of such fees unjust. Accordingly, we reverse and remand with directions that the trial court conduct further proceedings to determine the legal expenses and costs incurred by appellant in obtaining the requested records, including costs incurred on appeal, and order the trial court to award appellant appropriate attorney's fees pursuant to this opinion.

ROBBINS, C.J., BIRD, and NEAL, JJ., agree.

STROUD and KOONCE, JJ., dissent.

DISSENT BY: JOHN F. STROUD, JR.

DISSENT

JOHN F. STROUD, JR., Judge, dissenting. I respectfully dissent from the majority opinion and would affirm the trial court's denial of the award of attorney's fees. The trial court's order contained a paragraph pertaining to the request for attorney's fees, which provided:

2. Pursuant to Ark. Code Ann. § 25-19-107(d), and upon a finding that **Beaverfork** was substantially justified in denying the April 15, 1999 FOIA request, an award of attorneys fees would be unjust. Accordingly, no attorneys fees are

awarded to Kristen.

(Emphasis added.)

In *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), our supreme court quoted from an article published in 1987 *Arkansas Law Notes*, and explained that "t he court need not . . . make a fee award in every FOIA case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records." *Id.* at 208, 766 S.W.2d at 609 (emphasis in original). The court also stated that "we do not imply by this opinion that an award of litigation expenses under the FOIA will always be defeated in the absence of arbitrary or bad faith conduct on the part of the defendant." *Id.* Our standard of review in these cases is one of abuse of discretion. That is, the decision of whether to award a fee in such cases is a decision within the trial court's discretion and will not be set aside absent an abuse of that discretion. *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998).

The majority opinion concludes, without difficulty, that the refusal to produce records pursuant to the FOIA was "arbitrary to [*45] say the least, if not in bad faith." I cannot reach that conclusion because I disagree with the majority opinion's controlling conclusion that "

Beaverfork knew it was essentially performing a governmental [***15] function for which it received public funding. . . ." Moreover, the majority opinion's conclusion that the facts in the instant case are so directly on point with the facts in *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990), as to demonstrate that **Beaverfork** acted arbitrarily in refusing the request for documents is, to me, a stretch at best. In addition, the *Edmark* case did not involve an issue concerning the award of attorney's fees; it only addressed the applicability of the FOIA. Here, the trial court ultimately concluded that the FOIA was applicable, but that the denial of the FOIA request was substantially justified and that an award of attorney's fees would be unjust. Finally, the majority opinion is able to conclude that the trial court abused its discretion. I cannot agree that the trial court abused its [**65] discretion in finding that there was substantial justification for denying the FOIA request and that an award of attorney's fees would be unjust.

In short, I find it impossible on the record before us to say that the trial court abused its discretion in the instant case. Therefore, I would affirm.

I am authorized to state that Judge [***16] KOONCE joins in this dissenting opinion.

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